

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN M. ELLS, Personal Representative of the
ESTATE of MAYNARD B. ELLS,

UNPUBLISHED
February 7, 2006

Plaintiff-Appellee,

V

EATON COUNTY ROAD COMMISSION,

No. 264635
Eaton Circuit Court
LC No. 05-000128-NI

Defendant-Appellant.

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's denial of its motion for summary disposition under MCR 2.116(C)(7) in this negligence action. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 144; 687 NW2d 380 (2004). MCR 2.116(C)(7) tests whether a claim is barred because of governmental immunity, and requires consideration of all documentary evidence filed or submitted by the parties. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In determining whether a party is entitled to judgment as a matter of law under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Wilson, supra* at 145. Additionally, we review de novo issues of statutory interpretation. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004).

To establish a prima facie case of negligence, a plaintiff must be able to prove that the defendant owed the plaintiff a duty, the defendant breached that duty, causation and damages. *Haliw v Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Further, where the defendant is a governmental agency, the plaintiff must plead a cause of action in avoidance of governmental immunity. *Id.* at 302-304.

Plaintiff's complaint alleged that plaintiff's decedent died in a motor vehicle accident that was proximately caused by defendant's negligence when it "permitted, authorized or consented to the placement of a Type-3 barricade with various other signage" at the intersection where the accident occurred. Specifically, plaintiff alleged that defendant "owed a statutory duty to [p]laintiff's decedent, outside government immunity, to keep their highway in reasonable repair and to insure [sic] that it was reasonably safe and convenient for public travel." Plaintiff alleged

that the barricade “was placed on the traveled portion of the highway,” and that it “created an obstruction and defect in the traveled portion of the highway in that it obscured vision of vehicular traffic . . . including the decedent” Stated another way, the decedent’s “view of oncoming traffic . . . was obscured . . . so that he could not readily observe traffic approaching the intersection,” and “[t]hat as a proximate result of [d]efendant[’s] negligence and breach of duty, the decedent was struck at the intersection and died of his injuries.”

Defendant moved for summary disposition under MCR 2.116(C)(7), on the basis that plaintiff’s cause of action did not fall within the highway exception to governmental immunity, MCL 691.1402(1). Defendant also argued that it was entitled to summary disposition because plaintiff failed to provide proper notice as required by MCL 691.1404, and because it could not be held liable for failing to anticipate plaintiff’s decedent’s negligence in entering an intersection before making reasonable and proper observations of cross traffic.

The governmental immunity act, MCL 691.1401 *et seq.*, provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. The highway exception to governmental immunity requires a “governmental agency having jurisdiction over a highway”¹ to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1). “The duty of the . . . county road commission to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel. . . .” *Id.* *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162; 615 NW2d 702 (2000).

The circuit court denied defendant’s motion, finding that the highway exception to governmental immunity was applicable because the “barricade was located in the roadbed,” therefore constituting a “defect . . . in the active roadbed designed for vehicular travel.”² We agree.

Here, two large signs had been placed on the actual roadbed, the taller of the two signs was placed immediately behind the shorter one. The taller one stated “Road closed to thru traffic,” and the shorter one was an arrow stating “Detour” super imposed on a barricade, to alert passersby that the road was closed to thru traffic and that a detour existed, but that the road was open to a local golf course. The barricade was placed on the actual roadbed designed for vehicular travel. Under *Nawrocki*, *supra*, plaintiff thus pleaded in avoidance of governmental immunity. Although the *Nawrocki* Court’s holding included that “the state or county road

¹ Defendant does not dispute that it had jurisdiction over the roadway where the accident occurred.

² The circuit court relied on *Page v Bidwell*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket No. 249224), which affirmed a trial court’s decision that “[a] tree limb lying in the roadway and blocking a lane of traffic” fell within the highway exception to governmental immunity because it was “akin to any other type of debris that causes a dangerous condition in the improved portion of a highway designed for vehicular travel,” and therefore “clearly [constituted] a defect in the actual roadbed.” We are not bound by unpublished decisions of this Court, MCR 7.215(C)(1).

commissions have no duty, under the highway exception, to install, maintain, repair, or improve traffic control devices, including traffic signs,” *id.*, at 184, its holding is clearly limited to signage *not* located in the improved portion of the highway designed for vehicular travel. *Id.* at 183 (“A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity because *signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel.* Traffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the highway designed for vehicular travel.”) In contrast, the signage involved here was located within the actual roadbed designed for vehicular traffic.

Defendant alternatively argues that the circuit court erred in failing to address its claims that plaintiff failed to provide it proper notice under MCL 691.1404. We disagree.

Plaintiff’s complaint alleged that and the record supports that the Road Commission had actual notice of the incident. A manager (civil engineer) for the Eaton County Road Commission testified on deposition that he went to the scene of the crash on the afternoon of the incident and took extensive photographs of the crash scene. He testified that two other personnel from the Road Commission were present in the vicinity of the crash scene as well. On appeal, defendant asserts that it was prejudiced by the lack of notice because it was unable to “quickly preserve evidence necessary for its defense.” The documentary evidence submitted below, including photographs of the crash scene and the Road Commission manager’s deposition testimony, belie this contention. Defendant has not shown actual prejudice, thus its claim fails under *Brown v Manistee Co Rd Comm’n*, 452 Mich 354, 366-368; 550 NW2d 215 (1996).

Defendant’s final argument is that the circuit court erred in ignoring defendant’s argument below that the road commission did not have a duty to anticipate decedent’s negligence in failing to properly stop at the intersection as required by Michigan law. We disagree. First, we observe that defendant moved for summary disposition while discovery remained open. Further, defendant’s duty is defined by statute and plaintiff establish a genuine issue regarding whether that duty was violated.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Helene N. White